IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 654

SIDMON McHIE and HAMMOND REALTY COMPANY, a corporation,

Petitioners,

vs.

THE FIFTH AVENUE BANK OF NEW YORK, Executor of the Last Will and Testament of Isabel D. McHie,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TABLE OF CASES.

Cases Cited.

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MAY IT PLEASE THE COURT:

STATEMENT OF MATTER INVOLVED.

This case (130 Fed. 2nd 993) involves postnuptial settlement contracts in which both *personal* and *property* rights were covered by the same instruments, and concerning which it was held that personal rights could be breached with impunity as independent covenants regardless of the general tenor, effect and relation of the whole contracts.

Your petitioner, Sidmon McHie, made a contract with his wife in 1919 by the terms of which each would make a will in favor of the other, and under which petitioner would have inherited his wife's $250,000.00 estate. In 1926, in consideration of her covenant to cease annoying, molesting and bedeviling him for the rest of her life, he agreed to give up his right to her property under the 1919 contract. No sooner had the 1926 agreement been signed than she began to continue to annoy, molest and bedevil him, at the same time announcing a cynical contempt for the power of the "paid courts" to stop her from so doing, and this she kept up until she died in 1939. He divorced her shortly before her death, but the Circuit Court of Appeals' opinion expressly *excludes* the divorce decree as a factor in its decision, and bases the decision entirely on the law of *contracts* as applied to the 1919 and 1926 contracts. (R. 173 bottom; 174 top.)

Upon her death in 1939, it developed that she had left a will contrary to the 1919 contract. This will gave McHie nothing, but gave the bulk of her $250,000.00 estate to a dog training institution, in conformity with her personal motto which she had publicized during the years she was harassing McHie: "The more I see of men, the better I like dogs."

Among the assets of her estate were bonds of Hammond Realty Company guaranteed by McHie. Her executor sued McHie on this obligation and thereupon McHie counterclaimed, setting up his rights under the 1919 contract because Mrs. McHie had broken the 1926 agreement. The District Court for the Northern District of Indiana held that her breach of the 1926 agreement restored McHie's rights under the original 1919 contract and decreed him to be the equitable owner of the estate she left.

The 7th Circuit Court of Appeals, while admitting her flagrant and *malicious* violation of the 1926 agreement, held as a matter of law that *she could breach her covenant with impunity*, on the doctrine that it was an "independent covenant" and "not the essence of the contract," and that the essence of the contract was certain property clauses. It therefore reversed the District Court and denied McHie any right to her estate. If this decision is sound, it does the following things:

(1) It establishes the novel doctrine that *personal* rights are of *no consequence* when mingled with *property* rights in a contract, that the personal rights *can be maliciously breached with impunity*, and that the injured party is still bound by his side of the contract.

(2) It reverses the law of accord and settlement contracts established by the Indiana Supreme Court for a century,—that *all* covenants of a settlement contract must be fully performed, else the original contract revives.

(3) It reverses the law of accord and settlement contracts established by the United States Supreme Court and by the 1st, 2nd, 6th and 8th Circuit Courts of Appeals to the same effect as the rule of the Indiana Supreme Court.

(4) It reverses elementary principles of contract law laid down by American Law Institute's "Restatement Of The Law Of Contracts," and by such authorities as Mr. Williston and all the encyclopedias.

(5) The decision, unfortunately, ratifies Mrs. McHie's cynical prediction, made while she was committing

the breach, that the courts would be powerless to do anything about it.

R. 98, bottom.

R. 100, bottom.

(6) *The opinion contradicts itself on its face,* so as to leave the law unsettled and confused on independent covenants. While denying McHie relief on the ground that her annoying him was "independent" of the property covenants, the opinion turns around in the next sentence and condones her misconduct on the ground that he "annoyed" her by failing to pay money under a property covenant,—thereby admitting that the personal covenant not to annoy and the property covenants are *dependent.*

R. 174, top.

Note: The Circuit Court of Appeals' opinion is in R. 170 and the ruling on contract law is in R. 173, bottom. *The opinion is also printed as an appendix to this petition.*

This wife was McHie's second childless wife. She had no property of her own when he married her. He gave her this $250,000.00 fortune and took back a contract in 1919 binding her "irrevocably" to leave the fortune to him by will if she should die first (as she recently did). (R. 17, 19.)

In 1925, after she had extracted this fortune from him, she forced a separation by driving him out of his home at age sixty-two by threats and violence. Thereupon, in 1926, he and she made an agreement *settling* their *personal* and *property* rights. Among other things, he agreed to give up his rights to her property under the 1919 contract and she agreed not to molest or annoy him, and they agreed to live apart. The opening part of the 1926 agreement

recites that the *moving cause* of the contract is the *personal* desire of the parties to separate in order to avoid previous "friction" and to promote their "comfort, health and happiness," and that the property clauses are merely "*in connection with* the separation." (R. 27 top; 30 middle.) He subsequently divorced her in 1936, but the Circuit Court of Appeals' opinion expressly *excludes* the divorce decree as a factor in its decision, and bases its decision entirely on the law of *contracts.* (R. 173 bottom; 174 top.)

She flagrantly, wilfully and *maliciously* broke her covenant not to molest him, from the time she made it in 1926 continuously until she died in 1939, so this consideration that McHie bargained to get was wholly *unperformed.* (R. 121, top.)

While thus harassing McHie, she mocked and flouted the power of the "paid courts" to do anything about her breach.

R. 98, bottom.
R. 100, bottom.

In the federal District Court (N. D. Indiana) following her death, McHie sought enforcement of the 1919 contract (R. 15), while Mrs. McHie's executor claimed that the 1919 contract had been abrogated by the 1926 agreement. (R. 24, bottom.)

The District Court, upon uncontradicted documentary evidence (R. 93-102), found her guilty of *flagrant, wilful and malicious breach* of her 1926 covenant, as aforesaid, and found that this covenant "constituted one of the *true* considerations" for which McHie *in fact* executed the 1926 contract; and found that "said consideration had *completely failed* at the time of decedent's death," due to her own wilful and malicious breach.

R. 121, top.

The District Court concluded that McHie was entitled to his rights under the 1919 contract and decreed him to be the equitable owner of her estate, amounting to about $250,000.00. (R. 121, 122.) Mrs. McHie's executor appealed. (R. 128.)

The Circuit Court of Appeals admitted the correctness of the District Court's findings of fact, but held as a matter of *law* that *she could commit the breach with impunity* because the right breached was not a *property* right, saying in its opinion:

> "The essence of the contract of March 22, 1926 was the settlement of the extensive *property* rights of the parties * * *. *Because* the Sixth Covenant (not to molest or annoy him) was an *independent* covenant and *not the essence* of the contract, we do not think its breach constituted such failure of consideration as to entitle the defendant Sidmon McHie to treat the (1919) contract as ended." (Our language interpolated in parenthesis.)
>
> R. 173 bottom; 174 top.

Besides drawing a line between property and personal rights, the opinion contradicts itself on the question of whether the covenant against annoyance is, or is not, independent. While denying McHie relief on the ground that her annoying him was "independent" of the property covenants, the opinion turns around in the next sentence and condones her misconduct on the ground that McHie "annoyed" her by failing to pay money to her under one of the property covenants,—thereby admitting that the personal and property covenants are actually *dependent* on one another. The opinion says:

> "The defendant, Sidmon McHie, as we have pointed out, breached the contract as to *payments* for support. He never paid on it after May, 1932. *This* undoubtedly *annoyed* Isabel D. McHie, and was doubtless the

reason why she exhibited her annoyance to and *molested* the defendant Sidmon McHie."

R. 174, top.

The District Court's decree specifies that Mrs. McHie's executor holds *all* her property as *trustee* for McHie, "for the purpose of specific performance" of the 1919 contract. (R. 127, top.) The effect of the executor's appeal was to *destroy the trust* created by the District Court, and completely to *change the beneficial ownership* of the trust estate,—taking it away from McHie and giving it to the legatees in Mrs. McHie's last will.

Her last will, made in 1935, leaves McHie nothing, but leaves the bulk of her estate to a dog-training institution. She says in her will that she predicates her right to do this on the ground that the 1926 contract "is still in existence." (R. 107, top.)

While seeking to *destroy this trust* and to take the ownership thereof away from McHie on appeal, the executor *was acting under the trust* below and was collecting a trust asset *for the benefit of McHie.* This asset consisted of Hammond Realty Company bonds which Mrs. McHie owned at her death. The same decree which sets up the trust reduces the bonds to a money judgment in favor of the executor against Hammond Realty Company. *This judgment is part of the assets of the trust* established by the decree.

As soon as the decree was rendered, the executor proceeded immediately to enforce and collect this trust asset (money judgment), both before appeal to the Circuit Court of Appeals and while the appeal was pending undecided. This enforcement consisted of collecting $1,000.00 cash from the debtor corporation by writ of execution on the

judgment (R. 162, top) and also causing the Marshal to levy the writ on the debtor's real estate. (R. 150.)

Under the last mentioned facts, McHie moved the Circuit Court of Appeals to dismiss the appeal (R. 160), on the ground that the executor's *inconsistent* conduct of *acting for* McHie and collecting a trust asset below, while appealing *against* McHie and attacking the trust above, waived the appeal. Appellant answered the motion, admitting the facts but denying that they constituted a waiver of the appeal. The answer expressly admits that the appellant

> "is attempting to collect the judgment for *his* (McHie's) *benefit.*"
>
> R. 165, par. 4, end.

The Circuit Court of Appeals' opinion denies the motion to dismiss. The opinion quotes Indiana Supreme Court authority that the test for dismissal is whether appellant has "accepted the benefits of the adjudication." (R. 171.) It then proceeds to misconstrue and violate the quoted rule in the following respects:

(1) This decision ignores the crucial fact that appellant was *acting under the trust* decree below, and was collecting a trust asset for the benefit of the *beneficiary* decreed below. This amounts to the trustee "accepting the benefits of an adjudication" which is the test for dismissal laid down in the Indiana case quoted. (R. 171.)

(2) The decision ignores the crucial fact that appellant was not "entitled in any event" to collect trust assets for *McHie's benefit* in the court below. Its appeal was for the *legatees' benefit* and if successful would change the ownership of the asset from

McHie to the legatees. Hence, this case does not fall within the exception stated in the opinion. (R. 171.)

(3) The decision is based on the false and superficial premise that McHie was not prejudiced by the "collection" below. **McHie was fundamentally prejudiced by having his trustee pretend to serve two masters—him below and his opponent above.** His trustee was not compelled to start serving him below while appealing, but having chosen to start serving him, it waived the appeal.

(4) This decision as to waiver of appeal violates precedents of the United States Supreme Court and Circuit Courts of Appeals for the 3rd and 8th circuits, cited under "Reasons for Allowance of Writ," *infra.*

Hence, the motion to dismiss does not rest on any technical defect in the appeal but on appellant's *voluntary conduct* affecting the *subject matter* of the case, which waives the appeal according to both Indiana and federal law. Denial of this *substantive* right of appellee merits review, and if well taken disposes of the case.

CITATION OF DECISION BELOW.

The District Court's decision is not reported but appears in R. 119-127.

The Circuit Court of Appeals' decision, rendered on October 30, 1942, within three months of this petition, is not yet officially reported but appears in:

Fifth Avenue Bank of New York v. *Hammond Realty Company and Sidmon McHie*, 130 F. (2d) 993.

R. 170.

Note: For convenience, the opinion is also printed as an appendix to this petition, under the same page numbers as appear in the Record.

BASIS OF THIS COURT'S JURISDICTION.

Jurisdiction is invoked under *Title 28, Sec. 347(a), Judicial Code, sec. 240, amended*, empowering this Court to review "*any*" case in a Circuit Court of Appeals by certiorari.

This case falls within the class indicated by *Rule 38* as meriting review, because:

(1) The decision lays down an erroneous principle of contract law in conflict with decisions on the same matter by:

(a) The Supreme Court of the United States,

(b) The 1st, 2nd, 6th and 8th Circuit Courts of Appeal,

(c) The Indiana Supreme Court (case originated in Indiana).

(2) The opinion is self-contradictory on its face and thereby unsettles the contract law on "independent covenants".

(3) The decision "so far departs from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision," to-wit: By permitting a trustee appellant to *serve two masters* during appeal. This conflicts with decisions on the same matter by:

(a) The Supreme Court of the United States,

(b) The 1st and 8th Circuit Courts of Appeal,

(c) The Indiana Supreme Court.

QUESTIONS PRESENTED.

The Circuit Court of Appeals' opinion admits the facts found by the District Court, and rests upon one question of *contract* law and one question of *waiver* of appeal, both fundamental, and both decided contrary to federal and Indiana precedents. These questions are:

(1) Are *personal* rights (such as the right not to be annoyed, molested and bedeviled) on a par with *property* rights when both are mingled in a contract? In other words, can one party *maliciously* violate the personal covenant and still hold the other party to the contract, on the doctrine that the personal right is "not the essence" of the contract, in spite of the express recital in the contract that the personal feature is the moving cause of the contract?

(a) Should the Circuit Court of Appeals be permitted to reverse the substantive contract

law of Indiana (where the case originated) and reverse an elementary principal of contract law,—namely that *all* covenants of an accord or settlement contract must be *fully* performed, else the original contract revives?

(2) Can a trustee appellant *serve two masters* during an appeal? In other words, can appellant pretend to collect part of the trust assets below for McHie's benefit, while appealing for the benefit of McHie's opponents (legatees under the will)?

(a) Should the Circuit Court of Appeals be permitted to violate the substantive law of Indiana, and also violate precedents of the Supreme Court and of the 3rd and 8th Circuit Courts of Appeal, on an elementary principle of waiver,—namely that accepting the benefit of a decree below waives the appeal?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The decision violates elementary principles of contract law. It places *property* rights in the 1926 contract above *personal* rights in the same contract, and holds that the latter can be violated with impunity on the doctrine that they are "not the essence of the contract."

(1) Such decision violates the plain language of the 1926 contract which recites that the *personal* desire to separate, to be let alone and not to be annoyed or molested is the *moving cause* of the contract and that the property clauses are merely "*in connection with*" the separation.

R. 27 top; 30 middle.

(2) The decision violates Indiana Supreme Court precedents for a century on accord and settlement contracts,—the Indiana law being that

> "an accord cannot constitute a bar * * * unless shown to have been *fully* executed * * * Upon the failure (to fully perform) * * * they were remitted to their *original rights* * * * as if the accord had never been agreed upon."
>
> *Jackson* v. *Olmstead* (1882), 87 Ind. 92, 94.
> *Kingan* v. *Gibson* (1870), 35 Ind. 53, 54, top.
> *Demeese* v. *Cheek* (1871), 35 Ind. 514.

(3) The decision violates the law of accord and settlement contracts established by the United States Supreme Court and by the 1st, 2nd, 6th and 8th Circuit Courts of Appeals that "*nothing short of fulfillment* of the (settlement) agreement would discharge the original demand."

Brown v. *Spofford* (1877), 95 U. S. 474; 24 L. Ed. 508, 510, second column.

Frankfurt-Barnett Co. v. *William Prym Co.* (1916) (C. C. A. 2), 237 Fed. 21, 27.

Wind v. *England Walton & Co.* (1923) (C. C. A. 1), 287 Fed. 97, 99.

Shubert v. *Rosenberger* (1913) (C. C. A. 8), 204 Fed. 934, 938.

First Nat. Bank v. *Leech* (1889) (C. C. A. 8), 94 Fed. 310, 311.

Humphreys v. *Third Nat. Bank* (1896) (C. C. A. 6), 75 Fed. 852, 859.

(4) The decision violates elementary principles of contract law laid down by American Law Institute, by Mr. Williston in his authoritative work on contracts, and by the encyclopedias,—these principles being:

"If the accord is *not performed*, the creditor's duty thereunder is discharged, and he may *enforce his original claim.*"

Restatement of Law Contracts (1932 perm. Ed.), Sec. 417.

"*Part performance* of the accord is of no more avail than tender. *The old claim is still undischarged.*"

Williston on Contracts (1938, Revised Ed.), Sec. 1843 end.

"*Nothing short* of actual, full, *complete*, and exact performance or execution of the agreement of accord in its *entirety* will suffice."

1 C. J. S. page 541, sec. 37.

1 C. J. pages 532, 533.

"The execution must be *complete*, for if *part* of the *consideration* agreed on is not performed, the whole accord fails."

1 Am. Jur. page 253, sec. 67.

(5) The above principle is not confined to accords, but applies to contracts generally:

"* * * one party *should not be required to perform* if the other does not. The latter principle, like the excuses based on fraud, duress or mistake, is founded on concepts of *justice*, and is *imposed by law* although there may be no reason to suppose that the question that has arisen was within the contemplation of the parties."

Restatement of Law of Contracts (1932 Perm. Ed.), Sec. 274, at page 400.

(6) The decision commits fundamental error by dealing with the *wrong field* of contract law. It is predicated on the "*independent covenant*" doctrine which is applicable mainly to *commercial* contracts. The 1926 contract was a settlement of *property* and *personal* rights between husband and wife, which calls for the application of the law of accord, and failure of consideration. It was not a commercial contract.

But even on the basis of the "independent covenant" doctrine the decision is wrong. It misapplies the doctrine, because:

(a) The doctrine is inapplicable to the uncontradicted documentary facts. The 1926 contract recites that the *inducing cause* of the separation and of the separation contract was

the personal consideration of not being molested and annoyed,—to avoid previous "friction" and to promote their "comfort, health and happiness." (R. 27, top.)

(b) The District Court expressly found that her covenant not to annoy and molest McHie "constituted one of the *true considerations* for said *Agreement.*" The District Court further found that "one of the several considerations for which counterclaimant (McHie) in fact executed *the contract* of March 22, 1926 * * * was a covenant by said decedent that she '*shall not molest or annoy*' him." The finding plainly says that this promise by her was in fact a consideration which induced McHie to execute the *contract* as a whole,—not merely as an independent separate covenant. (R. 121, top.)

(c) The Circuit Court of Appeals' opinion admits the facts found below (R. 173) but holds as a matter of law that the independent covenant doctrine applies. (R. 174.)

(d) Such ruling violates the basic principle laid down by the American Law Institute,—that a covenant is *dependent* when it is an *inducing cause* of the whole contract, and also when the covenant is of such character that its breach cannot adequately be compensated in damages, and particularly where the breach is *wilful.*

Restatement of Law of Contracts (1932, Perm. Ed.), sec. 270, sec. 275(b)(e).

Board v. *South Bend etc. Ry. Co.* (1888), 118 Ind. 68, 79, 20 N. E. 499 (end).

(e) This ruling also violates the elementary principle that "Courts will not and ought not to construe promises as independent unless no other interpretation is possible."

12 Am. Jur. page 850, sec. 298.

Williston on Contracts (1938 Revised Ed.) sec. 1847.

"It is evident the inclination of courts has strongly favored the latter construction (*dependent* covenants) as being obviously the most just."

The Bank of Columbia v. *Hagner* (1828), 1 Peters (26 U. S.), 455, 465; 7 L. Ed. 219, 223.

(7) *The opinion is self-contradictory* on the "independent covenant" doctrine. While deciding against McHie on the ground that her covenant not to annoy and molest him was "independent" of the property clauses, the opinion turns right around in the next breath and tries to condone her breach of this covenant by arguing that she did it because of his failure to pay certain support money under one of the *property clauses*. Hence, the opinion makes the covenant "independent" for the purpose of deciding against McHie, but "dependent" for the purpose of glossing over her breach.

R. 174, top.

Moreover, the opinion inadvertently states only a half-truth when it makes the above accusation that McHie defaulted his support money payments. The undisputed record shows that McHie paid money to this woman until he was bled white and by 1932 his total fortune, once millions, was reduced to the modest figure of between

$35,000.00 and $55,000.00, a mere fraction of her fortune, barely sufficient to take care of him in his old age, and these assets consisted of slender equities liable to be lost under heavy mortgages. Hence, his suspension of the $1,000.00 per month support payments to her was caused by dire necessity and not by any wrong or wilfulness on his part. (R. 84, middle.)

Contrary to the opinion's argument that her misconduct was *caused* by McHie's suspension of payments (R. 174, top), the District Court found that her misconduct was *caused by malice* and that she began this misconduct as early as 1926, *six years before* McHie suspended payments in 1932, so the suspension could not have been the cause.

R. 121, top.

Though founded on a false premise of fact, the opinion's argument that McHie's default of a *property* covenant to pay money would operate to justify her breach of the *personal* covenant against annoyance, is an *implied ruling* that the personal and property covenants are *dependent* (as they really are). This reasoning in the opinion destroys the conclusion reached in the next sentence that the covenant against annoyance is *independent.*

This confusion can be cut short by taking the opening part of the 1926 separation agreement which recites that its moving cause is to *avoid friction* and to promote their "*comfort, health and happiness*" and that "in connection with" the separation, property rights are "relinquished". (R. 27, top.) The agreement then concludes with the Sixth Covenant against annoyance, so as to make effective the moving purpose. (R. 30, middle.) Then compare the District Court's finding, the accuracy of which is not challenged in the Circuit Court of Appeals' opinion, namely:

"One of the several considerations for which counterclaimant (McHie) in fact *executed* the *contract* of March 22, 1926, was a covenant by said decedent (Mrs. McHie) that she 'shall not annoy or molest' him. Said decedent *continuously, completely and flagrantly* breached said covenant from the time it was made down to the time of her death, by continuously and *maliciously* annoying and molesting him during that entire period. Said *consideration* had *completely failed* at the time of decedent's death."

R. 121, top.

Authorities in Opinion Distinguished.

(8) The opinion bases its "independent covenant" doctrine *solely* on two *domestic relations* cases: one involving *support of children* and the other *adultery.* These cases resemble ours only slightly on the facts and not at all on the law, to-wit:

Hughes v. *Burke* (1934), 167 Md. 472, 175 Atl. 335, 337, was where a wrong-doing husband *abandoned* wife and *children,* after which he contracted to support them. Held: Wife's alleged molestation of him did not discharge duty to support. The case was never cited in the same or any other court until the present opinion adopts it as a leading case on contract law.

Sabbarese v. *Sabbarese* (1929), 104 N. J. Eq. 600, 146 A. 592, holds that wife's *adultery* is a good defense to *separate maintenance suit.* Contains *dictum* that wife's molestation of husband would not be defense to enforcement of support money contract, but holds her concealed adultery is a defense to such contract.

Our case involves a broader question,—the husband's right to restoration of an earlier contract

giving him her $250,000.00 estate at her death. Moreover, the above cases of *Hughes* v. *Burke,* 167 Md. 472, and *Sabbarese* v. *Sabbarese,* 104 N. J. Eq. 600, state the *minority* rule. The majority rule holds covenants against molestation to be *dependent,* even in support money cases:

> "The wife may *breach* a separation *agreement* * * * by molesting and threatening the husband."
>
> *Lindey on Separation Agreements* (1937), page 325, citing *Hughes* v. *Burke,* 167 Md. 472, as a minority case and citing the following majority cases:
>
> *James* v. *Golson* (1915, Tex.), 174 S. W. 688.
>
> *Badolato* v. *Badolato* (1916), 104 Wash. 194, 176 Pac. 24.
>
> *Pezzoni* v. *Pezzoni* (1918), 38 Calif. App. 209, 175 Pac. 801.
>
> *Muth* v. *Wuest* (1902), 78 N. Y. S. 431.
>
> *Shimp* v. *Gray* (1910), 41 Pa. Super. Ct. 542.

II.

The decision violates an elementary principle on waiver of appeal. It permits appellant to pretend to *serve two masters* during the appeal,—pretending to collect part of the trust assets for *McHie's benefit* below, while actually appealing for the *legatees' benefit* (McHie's opponents).

(1) Appellant's answer to our motion to dismiss the appeal expressly admits:

> "Sidmon McHie is presently the beneficial owner of said judgment * * * plaintiff (appellant) is attempting to collect the judgment *for his* (*McHie's*) *benefit.*"
>
> R. 165, par. 4.

(2) The decision violates the very Indiana precedent quoted in the opinion. This precedent says that Indiana law is

> "declaratory of the common law rule that a party cannot *accept the benefit* of an adjudication and yet allege it to be erroneous." (R. 171.)
>
> *State ex rel. Jackson* v. *Middleton* (1938), 215 Ind. 219, 224; 19 N. E. (2d) 470, 472.

It also violates the following Indiana precedents which hold that accepting benefits of a favorable part of the decree waives the appeal *even though* the part accepted was *uncontroverted:*

Sterne v. *Vert* (1886), 108 Ind. 223, 224; 9 N. E. 127.

Sonntag v. *Klee* (1897), 148 Ind. 536, 538; 47 N. E. 962.

It also violates the following Indiana precedents which hold that waiver of appeal results from taking two *inconsistent positions* below and above, "the one affirming and the other denying the validity of the judgment."

Wyncoop, Adm. v. *Langhner* (1939), 106 Ind. App. 457, 459, 460; 19 N. E. (2d) 486.

Western Construction Co. v. *Board, etc.* (1912), 178 Ind. 684, 688, bottom; 98 N. E. 347.

(3) The decision violates precedents of the Supreme Court of the United States, and of the 3rd and 8th Circuit Courts of Appeals, to the same effect as the above Indiana cases:

South v. *Morris* (1934) (C. C. A. 3), 69 F. (2d) 3, 4, bottom 2nd column, citing *Albright* v. *Oyster, infra.*

Albright v. *Oyster* (1844), (C. C. A. 8), 60 Fed. 644.

Keonigsburger v. *Richmond Silver Mining Co.* (1895), 158 U. S. 41; 39 L. Ed. 899; 15 S. Ct. 751, 756, near end of opinion.

(4) The decision violates both Indiana and federal precedents which hold that parties acting in a representative capacity, such as trustees, administrators and attorneys, are subject to the same law as other litigants with respect to waiving appeals, and that those for whom they appeal are bound by their waiver.

65 C. J. 1077, sec. 1004.

Wyncoop, Adm. v. *Langhner* (1939), 106 Ind. App. 457, 459, 460; 19 N. E. (2d) 486.

Thompson v. *Midland etc. Cement Co.* (1905), 37 Ind. App. 459, 463; 77 N. E. 299.

South v. *Morris* (1934) (C. C. A. 3), 69 F. (2d) 3, 4, bottom 2nd column.

(5) Since the principle here involved is *waiver* of appeal rather than estoppel, the true test is appellant's *inconsistent conduct* below rather than "hurt" to the appellee, as the opinion erroneously holds (R. 172, top).

Nevertheless, McHie is seriously "hurt" by appellant's double-dealing in the two courts, due to the fact that McHie is the *sole stockholder and sole owner of the debtor corporation* from whom the judgment is being collected. This is shown by the exhibits of appellant's own pleading. (R. 52 middle; 55 middle.)

Hence, appellant's conduct places McHie in the quandary of not knowing whether appellant is levy-

ing on his corporation's assets for *his* benefit or for the benefit of his *opponents* (legatees). If for his own benefit, he can safely let appellant take the corporation's property on the judgment, but if for the benefit of his opponents he must protect the property against sacrifice at execution sale. Putting him in this quandary violates both the spirit and letter of the rule on waiving appeals.

Male v. *Harlan*, 12 S. D. 627, 82 N. W. 178, 180, 2nd column.

(6) Nor could it be argued that the substantive law of *waiver* of the right to appeal is changed by the new rules regulating procedure:

Schenk v. *Plummer* (C. C. A. 9), 113 F. (2d) 726.

U. S. v. *Sherwood*, 312 U. S. 584, 590, top; 61 S. Ct. 767, 771, top, 2nd column.

CONCLUSION.

This unique case decides two things in conflict with elementary principles established in Indiana, in the United States Supreme Court, in other Circuit Courts of Appeals, and announced by such authorities as Mr. Williston and American Law Institute:

(1) It is erroneously decided that *personal* rights are "not the essence" when mingled with *property* rights in a settlement contract, and hence, that one party can "flagrantly" and maliciously violate the personal rights with impunity while holding his opponent bound by the property clauses.

(2) It erroneously holds that a trustee appellant can *serve two masters* during appeal,—pretending to collect a trust asset for the trust beneficiary below,

while seeking to destroy the trust and shift ownership of the asset to the beneficiary's opponents on appeal.

These principles, we respectfully submit, merit review by this Honorable Court.

WHEREFORE, petitioners, Sidmon McHie and Hammond Realty Company, each separately pray that this petition be granted, that the Writ of Certiorari may issue to review this case, and for all further proper orders in the premises.

WALTER MYERS,
FREDERICK C. CRUMPACKER,
JAY E. DARLINGTON,
Attorneys for Petitioners.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8023. **October Term and Session, 1942.**

THE FIFTH AVENUE BANK OF NEW YORK, Executor of the Last Will and Testament of Isabel D. McHie,
Plaintiff-Appellant,

vs.

HAMMOND REALTY COMPANY, a Corporation, and SIDMON McHIE,
Defendants-Appellees.

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

October 30, 1942.

Before KERNER and MINTON, *Circuit Judges*, and LINDLEY, *District Judge*.

MINTON, *Circuit Judge*. The plaintiff, a New York corporation, as executor of the last will and testament of Isabel D. McHie, brought suit in the Northern District of Indiana against the Hammond Realty Company on certain past-due bonds, and against the defendant Sidmon McHie as a guarantor of the payment of said bonds under a written guaranty of April 11, 1933. The District Court found for the plaintiff and against the defendant Hammond Realty Company in the sum of $10,365.47 and costs; and declined to give judgment against Sidmon McHie and entered judgment for him on his counterclaim, holding that McHie was the equitable owner of all the property of which the testatrix died seized. Neither the plaintiff nor the defendant Hammond Realty Company appealed from the judgment against that company. The time for appeal has long

since expired, and this judgment has become final and conclusive.

The plaintiff did appeal from that part of the final judgment "that plaintiff recover no judgment against Sidmon McHie," and which found for Sidmon McHie on his counterclaim that he was the equitable owner of the property. After notice of this appeal had been given, an execution was issued against the Hammond Realty Company. Under that execution there was a levy upon certain property of the company, and the marshal collected one thousand dollars from the company on said execution. The defendant-appellee Sidmon McHie has made a motion in this court that the appeal be dismissed on the ground that the plaintiff cannot appeal from a judgment under which it has received a benefit, citing an Indiana statute and numerous Indiana cases to that effect. We recognize the existence of such a rule, but there is a well-known exception thereto, and we think the plaintiff-appellant comes within that exception. The rule and the exception are clearly stated by Judge Shake of the Indiana Supreme Court in *State ex rel. Jackson* v. *Middleton*, 215 Ind. 219, 224, 19 N. E. 2d 470, 472, as follows:

> "The statute (Sec. 2-3201 Burns 1933, Sec. 471 Baldwin's 1934) is merely declaratory of the common law rule that a party cannot accept the benefit of an adjudication and yet allege it to be erroneous. 4 C. J. S., p. 416. But, like most general rules, this has its exceptions and it is accordingly recognized that an acceptance of an amount to which the acceptee is entitled in any event does not estop him from appealing from or bringing error to the judgment or decree ordering its payment. *City of Indianapolis* v. *Stutz Motor Car Co.*, (1932), 94 Ind. App. 211, 180 N. E. 497. The facts upon which the court below rendered judgment against the appellees for $249.33 were stipulated by the parties and are undisputed. The appellant has not challenged the propriety of that part of the judgment by cross-errors and, so far as the motion to dismiss the appeal is concerned, the case comes clearly within the exception to the rule stated above. Appellees' motion to dismiss is therefore denied."

See also: *City of Indianapolis* v. *Stutz Motor Car Co.*, 94 Ind. App. 211, 180 N. E. 497.

The judgment against the Hammond Realty Company became final and conclusive and was not appealed from, and the plaintiff on facts stipulated was entitled to the judgment against it in any event. What the plaintiff collected from the Hammond Realty Company was the plaintiff's just due and in no wise prejudiced Sidmon McHie. If the case was affirmed, Sidmon McHie could not be hurt because the plaintiff would be holding the proceeds for the benefit of Sidmon McHie as the equitable owner thereof. If the case was reversed and Sidmon McHie held liable as a guarantor and not to be entitled as equitable owner, then the amount collected on the judgment against the Hammond Realty Company would reduce by that much the amount Sidmon McHie would have to pay as guarantor. The motion to dismiss is overruled.

This brings us to a consideration of the judgment in favor of Sidmon McHie on his counterclaim, and the judgment that plaintiff do not recover against him as guarantor. Sidmon McHie and the testatrix were married in 1909 and lived together as husband and wife until December, 1925, when they separated. On May 12, 1919 Mr. and Mrs. McHie had entered into a written contract for reciprocal wills, each providing that if the other survived he or she would provide by will that such survivor would get the property of the deceased person. After the parties had separated, to wit, on March 22, 1926, they entered into a contract for the disposition and division of their property, and the agreement of May 12, 1919 was expressly rescinded. The contract of March 22, 1926 is a document covering five pages in the record and disposing of many hundreds of thousands of dollars worth of property between the parties. It also provides that in addition to the property given to and confirmed to Isabel D. McHie under said agreement, the defendant Sidmon McHie was to pay her in addition one thousand dollars a month for her support as long as she lived.

The Sixth Covenant of this contract provides as follows:

> "Sixth: It is agreed that the parties shall live apart and separate and shall not annoy or molest each other."

All the provisions of the contract were executed except the monthly payments and the continuing obligation of the Sixth Covenant. In May, 1932 Sidmon McHie defaulted

in his payments of support under the contract, and continued in default. Sidmon McHie filed suit for divorce against Isabel D. McHie in the Lake Superior Court, and decree was entered in his favor, granting him a divorce July 3, 1936. This judgment was affirmed by the Appellate Court of Indiana. The divorce decree was granted on the grounds of cruel and inhuman treatment, which included, among other things, annoyance and molestation of Sidmon McHie by Isabel D. McHie in violation of the covenant of the contract of March 22, 1926.

Sidmon McHie's counterclaim in the matter now before this court declared upon the contract for reciprocal wills of May 12, 1919. The plaintiff answered that this contract had been rescinded by the contract of March 22, 1926. The District Court found that because Isabel D. McHie had flagrantly violated the Sixth Covenant of the contract of March 22, 1926, the consideration for this contract had failed and Sidmon McHie had a right to treat it as no longer in effect; and the contract of May 12, 1919 was thereby revived, and under this contract, Sidmon McHie was the equitable owner of the property of which the testatrix died seized.

The court found that Sidmon McHie did guarantee the payment of the bonds in suit. The court further found that for a valuable consideration Sidmon McHie did on February 1, 1939, in writing, guarantee the payment of these bonds. The court declined to enter judgment against Sidmon McHie as such guarantor for the reason that the court had found he was the equitable owner of the bonds and it would be equivalent to entering a judgment in favor of himself. The court did not declare whether Sidmon McHie was a guarantor of the bonds in suit under the written guaranty of April 11, 1933 or that of February 1, 1939.

We put to one side the effect the divorce decree had upon the property rights of the McHies, and we shall examine the covenants of the contract of March 22, 1926, which the District Court found Isabel D. McHie had flagrantly breached by annoying and molesting Sidmon McHie. Because she had breached this covenant, the District Court held consideration for the contract failed and Sidmon McHie was entitled to consider the contract of March 22, 1926 as at an end, and the contract of May 19, 1919 re-

stored. The essence of the contract of March 22, 1926 was the settlement of the extensive property rights of the parties, and this contract, as we have pointed out before, had been executed in every respect except as to the mutual obligations under the Sixth Covenant not to molest each other, and the covenant of McHie to pay one thousand dollars a month support, which he breached. The Sixth Covenant was an independent covenant, and it contained the mutual promise of each of the parties not to annoy or molest the other. The defendant Sidmon McHie, as we have pointed out, had breached the contract as to the payments for support. He never paid on it after May, 1932. This undoubtedly annoyed Isabel D. McHie, and was doubtless the reason why she exhibited her annoyance to and molested the defendant Sidmon McHie. Because the Sixth Covenant was an independent covenant and not the essence of the contract, we do not think its breach constituted such failure of consideration as to entitle the defendant Sidmon McHie to treat the contract as ended. *Hughes* v. *Burke*, 167 Md. 472, 175 A. 335, 337; *Sabbarese* v. *Sabbarese*, 104 N. J. Eq. 600, 146 A. 592.

As to the liability of Sidmon McHie on his guaranty, we again lay to one side the effect of the divorce decree upon the written agreement of April 11, 1933. The trial court found that Sidmon McHie was the guarantor of the bonds in suit, and found that he had for a valuable consideration on February 1, 1939 guaranteed in writing the payment of these bonds. The evidence of this later guaranty was admitted in the trial court without objection and was considered by the court on the motion for summary judgment. While it is true that the plaintiff had declared in its pleadings upon the written guaranty of April 11, 1933 and not the one of February 1, 1939, still since the evidence of the guaranty of February 1, 1939 was admitted without objection and approved by the court in a special finding, such finding is sufficient to support the court's conclusion of law that Sidmon McHie was the guarantor of the bonds in suit, and the pleadings will be deemed amended to meet the proof. Federal Rules of Civil Procedure, 15(b) 28 U. S. C. A., following Section 723c. *Low* v. *Davidson*, 113 F. 2d 364.

The judgment is reversed with instructions to vacate the judgment in favor of Sidmon McHie on the counterclaim, and to enter judgment against him on his written agreement of February 1, 1939 as guarantor of the payment of said bonds.

No. 654

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

SIDMON McHIE and
HAMMOND REALTY COMPANY,
a corporation,
Petitioners,

vs.

THE FIFTH AVENUE BANK OF NEW YORK,
Executor of the Last Will and Testament of
Isabel D. McHie,
Respondent.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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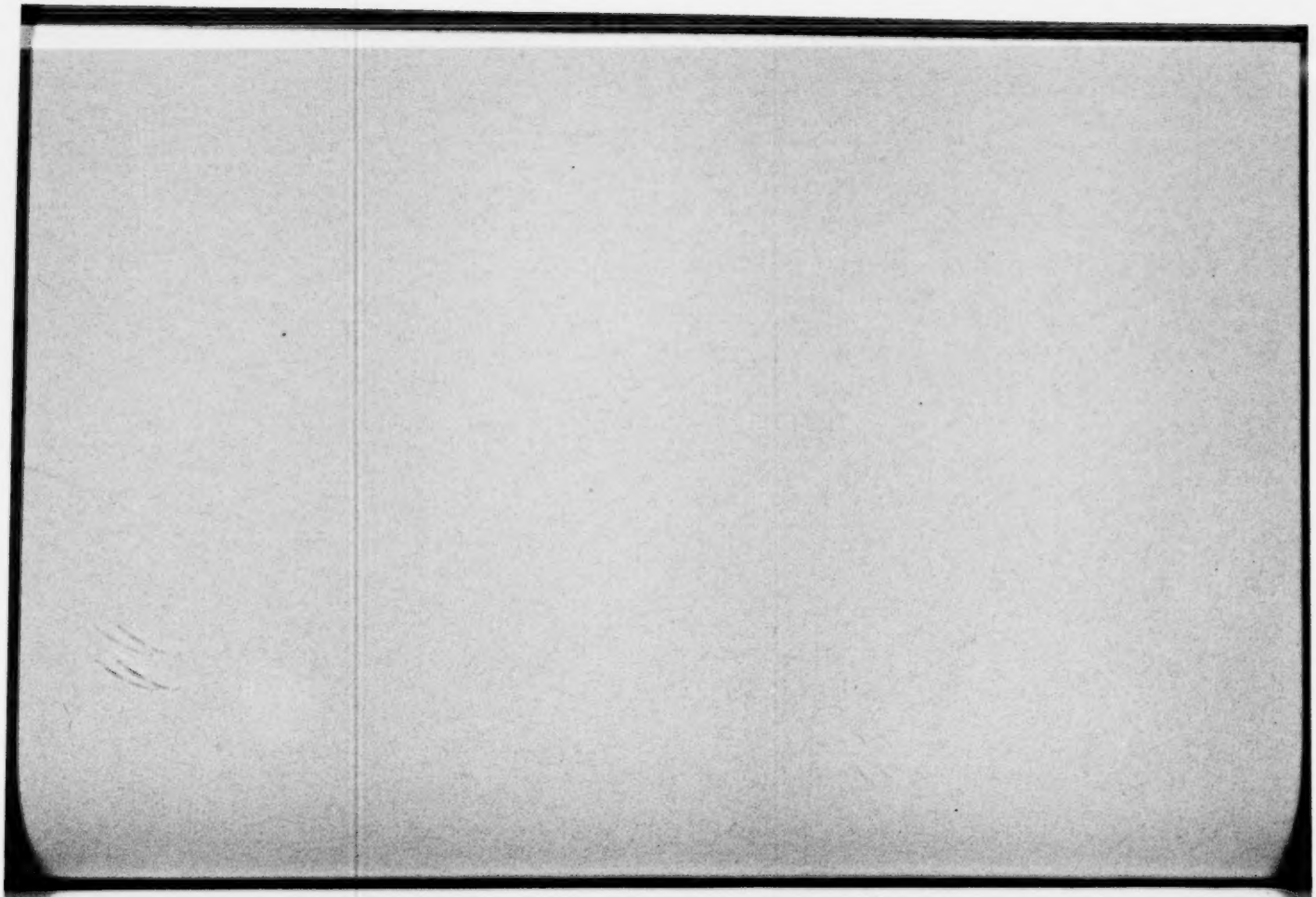

SUBJECT INDEX.

PAGE

Table of Cases.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 654

SIDMON McHIE and HAMMOND REALTY COMPANY, a corporation, Petitioners, vs. **THE FIFTH AVENUE BANK OF NEW YORK, Executor of the Last Will and Testament of Isabel D. McHie,** Respondent.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals, for the Seventh Circuit.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Decision Below.

The opinion of the United States Circuit Court of Appeals, for the Seventh Circuit, is reported at 120 Fed. (2d) 933.

Questions Presented.

This case involves two simple clear-cut questions of contract and local law about which there is no conflict in any jurisdiction, state or federal. The questions are these: (a) Was the sixth covenant of the 1926 separation agreement (R. 30) between Sidmon McHie and his wife a separate and independent covenant? (b) Can a litigant collect benefits which are admittedly due him in any event under one portion of a decree, and appeal from other distinct and unrelated portions of said decree?

With regard to the first question the Circuit Court of Appeals concluded that the sixth covenant of the 1926 separation agreement which provides as follows:

> "Sixth: It is agreed that the parties shall live apart and separate and shall not annoy or molest each other."

was not the essence of the agreement but was a separate and independent covenant, and even if there was a breach of said covenant that did not abrogate and destroy the entire separation agreement (R. 174). The Circuit Court of Appeals also concluded that the essence of the 1926 agreement was the settlement of the extensive property rights of the parties; that the contract had been fully executed in every respect except as to the mutual obligation of the parties under the sixth covenant not to molest each other, and the covenant of Sidmon McHie to pay his wife One Thousand Dollars a month support, which he breached (R. 174).

With regard to the second question the Circuit Court of Appeals concluded that the stipulated facts show (R. 172) that the Hammond Realty Company, one of the defendants in the original action, never denied its liability to respondent, and respondent's collection of part of its judgment against Hammond Realty Company merely constituted receipt of that to which it was entitled in any event. The opinion also stated (R. 172) that the judgment against the Hammond Realty Company was not appealed from and thereby became final and conclusive (R. 172). The Circuit Court of Appeals concluded, therefore, that respondent could appeal from those portions of the District Court's decree which held that Sidmon McHie was the owner of his former wife's estate, and overruled the motion of petitioners to dismiss the appeal (R. 172). It should be noted that Hammond Realty Company has no

status here as a petitioner because it never appealed from the judgment against it.

The record in this case, as well as the opinion of the Circuit Court of Appeals, clearly demonstrate that the foregoing are the only questions now before this Court. Although petitioners devote a great portion of their brief to a lengthy discussion and argument of the principle of accord and satisfaction, it is apparent that that principle of law has no application to the present controversy.

Statement of the Case.

Petitioners have not stated the case in either their petition or brief so as to fairly present the matter involved.

Respondent, as executor of the last will and testament of Isabel D. McHie, brought a civil action (R. 1-8) in the District Court for the Northern District of Indiana, Hammond Division, to collect certain first mortgage bonds made by the Hammond Realty Company, an Indiana Corporation, the payment of which bonds was unconditionally guaranteed by Sidmon McHie. The Hammond Realty Company and Sidmon McHie were made defendants. Sidmon McHie filed a counterclaim in the action (R. 15, 16) asserting that he was entitled to the entire estate of his former wife on the theory that she had breached the sixth covenant of the 1926 separation agreement, that is, the covenant whereby the parties mutually agreed to live apart and separate and not to annoy or molest each other. The Hammond Realty Company offered no defense to the action and did not deny its liability (R. 172). The District Court rendered judgment in the sum of Ten Thousand Three Hundred Sixty-Five Dollars and forty-seven cents ($10,365.47), plus costs of Twenty-Nine Dollars ($29.00), for respondent against the Hammond Realty Company, and also rendered judgment sustaining the motion of Sidmon McHie for summary judgment, concluding that Sidmon

McHie was the equitable owner of the estate of his former wife (R. 122-127). Respondent appealed from that portion of the judgment which denied it judgment against Sidmon McHie as guarantor, and also from that portion of the judgment which decreed that Sidmon McHie was the equitable owner of the estate.

The McHies were married in 1909 and lived together as husband and wife until December 1925, when they separated (R. 26). On May 12, 1919, they signed an agreement for the execution of reciprocal wills (R. 17). On March 22, 1926, the McHies, then living separate and apart, executed a separation agreement (R. 26), specifically rescinding and cancelling the 1919 agreement (R. 29). The 1926 separation agreement, in great detail, provided for specific division of their respective property. Among other things, this agreement provided that it was the intention and desire of both parties that there be a complete, final and effective decision and settlement of their respective rights and holdings (R. 27); that one of the considerations of this contract was their mutual agreement to cancel and rescind the 1919 agreement for reciprocal wills (R. 29); that each party waived and released the property of the other, then owned or thereafter to be acquired, from any claim or title, contingent, reversionary or otherwise, and from any right of inheritance or descent (R. 29-30), and that it was the intention of both parties that during their respective lifetimes they could deal with their separate estates as therein described and defined as if they were unmarried and that upon the death of either, the property, both real and personal, then owned by him or her, should pass by his or her will under the law of descent as the case may be, free from any right of inheritance, title or claim in the other party and as if the parties at such time were unmarried (R. 30). In a separate cove-

nant (Sixth), at the end of the separation agreement (R. 30) the parties mutually agreed to live apart and separate and not to annoy or molest each other.

On November 11, 1933, Sidmon McHie filed an action for divorce in Indiana against his wife. In his amended complaint for divorce he alleged that the parties had entered into the 1926 separation agreement and stated that the purpose of the agreement was to obtain a final settlement and division of their property rights and also to provide monthly support for his wife (R. 65). He further alleged in his divorce complaint that he had fully performed his obligations under the 1926 separation agreement, except that he was in default in making his monthly support payments, and solemnly asserted that "* * * he has always abided by and intends to continue to abide by those provisions of said separation agreement relative to the division of property therein set forth * * *" (R. 66).

He was granted a divorce July 3, 1936 (R. 89-90), and the decree was affirmed by the Indiana Appellate Court on October 28, 1938 (R. 90-91). The Indiana Appellate Court decision is reported in *McHie* v. *McHie,* 16 N. E. (2d) 987. In its Conclusions of Law No. 3 the Indiana divorce court referred to the 1926 separation agreement and confirmed it as fully executed except with regard to the provision for monthly support:

> "The decree should confirm to each party the absolute ownership of the property, real and personal, now held by him or her, whether acquired by virtue of said separation agreement of March 22nd, 1926, or otherwise. Transfers of property made pursuant to said agreement should be confirmed on the ground that they are executed transfers, regardless of whether said agreement was originally enforcible or not" (R. 88).

In its Final Judgment and Decree granting McHie his divorce, the Indiana court said:

> "(2) That there is hereby confirmed to each party the absolute ownership of all the property, real and personal, now held by him or her, free from any right, title, interest or claim, legal or equitable, present or future, by the other thereto" (R. 89).

April 27, 1939, Isabel D. McHie died. Among the assets belonging to her estate were the bonds made by the Hammond Realty Company, guaranteed by her former husband. Several months after her death, that is on January 30, 1940, the attorneys for petitioners wrote to the attorney for the executor, admitted the obligation due to the estate, offered to make a payment on account and requested a six month extension on the balance (R. 58, 59).

On October 11, 1940, respondent filed its action against petitioners. Sidmon McHie filed a stipulation (R. 110, 111), admitting all the material allegations of the complaint. He also filed a counterclaim (R. 15-21) and asserted that under the 1919 agreement for reciprocal wills he was entitled to his former wife's entire estate. Respondent answered the counterclaim (R. 24-30), admitting the execution of the 1919 agreement, but asserting that said agreement had been cancelled and rescinded in its entirety by the 1926 separation agreement. Respondent's answer also asserted that the divorce decree was *res adjudicata* with regard to the property rights of the parties or their privies.

The District Court found that the 1926 separation agreement was completely nullified because Mrs. McHie had annoyed and molested her husband; that the 1919 agreement for reciprocal wills was thereby automatically

revived, and concluded that Sidmon McHie thus became the owner of the estate which his former wife by her will (R. 108, 109) left to her parents and The Seeing Eye, Incorporated, a charitable institution which trains dogs for the blind. The District Court's Findings of Fact, Conclusions of Law, and Final Judgment and Decree are found at (R. 119-127).

Petitioners do not correctly state the facts when they say that the consideration for the 1926 agreement was "her" covenant to "cease annoying, molesting and bedeviling him for the rest of her life." The fact is that both parties agreed not to annoy or molest each other (R. 30). Nor are petitioners correct when they state that "he" agreed to give up "his" right to "her" property under the 1919 agreement for reciprocal wills. The fact is that both parties gave up their respective rights in each other's property (R. 29, 30).

Petitioners are also incorrect when they state that the Circuit Court of Appeals expressly excluded the divorce decree as a factor in its decision. The Circuit Court of Appeals simply found it unnecessary to rely upon the divorce decree. There is nothing in the opinion of the Circuit Court of Appeals which suggests that the divorce decree was not material or pertinent to the issues before the court. The court merely concluded that the independent covenant doctrine was ample to require a reversal. The effectiveness of its judgment would not be augmented by adding further reasons to support it. Such procedure is customarily followed by reviewing courts.

Summary of Argument.

I. Petitioners do not come within the class of cases referred to in Rule 38(5) of this Court. They do not cite any authority, local or federal, in conflict with the decision of the Circuit Court of Appeals.

II. The decision of the Circuit Court of Appeals in construing the sixth covenant of the separation agreement as separate and independent is in strict accord with all established authorities, local and federal. The cases cited by petitioners refer to the doctrine of accord and satisfaction and have no application to a covenant "not to molest or annoy" in an executed separation agreement which provides for division of extensive property rights of the parties.

III. The decision of the Circuit Court of Appeals in overruling the motion to dismiss the appeal was based on the established law of the State of Indiana. Its judgment is also in accord with the decisions of this Court.

IV. The Circuit Court of Appeals could also have reached the same result by holding that the divorce decree was *res adjudicata* in that it permanently and finally settled and adjudicated the property rights of the McHies.

ARGUMENT.

I.

Petitioners do not come within the class of cases referred to in Rule 38(5) of this Court. They do not cite any authority, local or federal, in conflict with the decision of the Circuit Court of Appeals.

This case does not come within the class of cases referred to in Rule 38(5) of this Court. The questions presented here involve contract and local law. Hence, under the doctrine of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, as interpreted by this Court in *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, petitioners are required to show the existence of a real conflict between the decision of the Circuit Court of Appeals and local decisions in Indiana. In *Ruhlin* v. *New York Life Ins. Co., supra,* at page 206, this Court said: "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari." And at the same page this Court continued: "The Rules indicate that the Court will be persuaded to grant certiorari where a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions.' " There is no conflict between the decision of the Circuit Court of Appeals and applicable local decisions on the principle of separate and independent covenants. Petitioners have not cited a single case, Indiana, federal or otherwise, which, on similar facts, is contrary to the judgment of the Circuit Court of Appeals in this case. Their authorities which refer to the doctrine of accord and satisfaction are clearly inapplicable here.

As a second reason for obtaining a writ under Rule 38(5), petitioners argue that the opinion of the Circuit Court of Appeals is self-contradictory on its face and

thereby unsettles the contract law on independent covenants. They say that this resulted because the Circuit Court of Appeals stated (R. 174) that Sidmon McHie's failure to make his required monthly support payments was doubtless the reason why Mrs. McHie exhibited her annoyance to and molested her husband. The opinion indicates clearly that the language referred to was simply an observation made by the court and did not constitute the reason for the decision.

As a third reason for invoking the jurisdiction of this Court, petitioners urge that the decision of the Circuit Court of Appeals overruling their motion to dismiss the appeal so far departed from the accepted and usual course of judicial proceedings, as to call for the exercise of this Court's power of supervision. In overruling the motion, the Circuit Court of Appeals relied on the following Indiana cases: *State ex rel. Jackson* v. *Middleton,* 215 Ind. 219, 224, and *City of Indianapolis* v. *Stutz Motor Car Co.,* 98 Ind. App. 211. No contrary or conflicting authority, local or federal, is cited by petitioners.

We submit therefore that this case does not come within the class of cases referred to in Rule 38(5), and the petition for a writ should be denied.

II.

The decision of the Circuit Court of Appeals in construing the sixth covenant of the separation agreement as separate and independent, is in strict accord with all established authorities, local and federal. The cases cited by petitioners refer to the doctrine of accord and satisfaction and have no application to a covenant "not to molest or annoy" in an executed separation agreement which provides for division of extensive property rights of the parties.

In its opinion (R. 172) the Circuit Court of Appeals pointed out that the 1926 separation agreement (R. 26-30) covered five pages in the record, and the court concluded that the essence of the contract was the settlement of the extensive property rights of the parties. The court also pointed out (R. 174) that this contract had been executed in every respect except as to the mutual obligations of the parties under the sixth covenant not to molest each other and except as to the covenant of Sidmon McHie to pay monthly support to his wife, which covenant the court found he breached. The court concluded, therefore, that it was apparent from an examination of the separation agreement that the sixth covenant was separate and independent and did not constitute the essence of the contract (R. 174). The true considerations for the execution of the 1926 separation agreement were as follows: (a) Division of the extensive property between the parties; (b) the desire of Sidmon McHie to be relieved of his legal duty to support his wife; (c) the desire of both parties to have the other relinquish any right that he or she might have in the property of the other; (d) their mutual desire to live apart and separate (R. 26-30). As a matter of fact, Sidmon McHie himself construed the chief purpose of the 1926 agreement to be a division of

their respective property rights. He so stated in his amended complaint for divorce (R. 65).

In determining that the sixth covenant was separate and independent, the Circuit Court of Appeals relied on *Hughes* v. *Burke,* 167 Md. 472, 175 A. 335, 337, and *Sabbarese* v. *Sabbarese,* 104 N. J. Eq. 600, 146 A. 592. Other cases in accord are:

> *Stern* v. *Stern,* 112 N. J. Eq. 8, 10.
> *Fearan* v. *Earl of Aylesford,* 14 Q. B. Div. 792.
> *Moller* v. *Moller,* 188 A. 505, 507.

Petitioners have not cited a single Indiana or federal case, on similar facts, in conflict with any of the foregoing authorities.

Petitioners urge that the Circuit Court of Appeals applied the "wrong field" of contract law in construing the sixth covenant. They claim that the doctrine of independent covenants does not apply to separation agreements, but pertains only to commercial contracts. Petitioners are obviously in error because the cases cited by the Circuit Court of Appeals and the other cases cited above all pertain to separation agreements, and in each instance the court applied the accepted doctrine of separate and independent covenants.

Petitioners cite no cases in conflict with the decision of the Circuit Court of Appeals, which embrace extensive property provisions in separation agreements which have been *fully executed.* Instead, they elected to argue the law of accord and satisfaction. Those cases have no bearing in the instant case, and are of no assistance to them in this Court.

III.

The decision of the Circuit Court of Appeals in overruling the motion to dismiss the appeal was based on the established law of the State of Indiana. Its judgment is also in accord with the decisions of this Court.

The District Court's decree (R. 122-127) provided as follows:

(a) Sidmon McHie was accorded all of the rights which he had under the May 1919 agreement for reciprocal wills.

(b) Sidmon McHie was declared to be the owner of the estate left by his former wife.

(c) Respondent, executor of the estate of Mrs. McHie, was given a judgment against Hammond Realty Company, one of the defendants, for $10,365.47, plus costs.

(d) Respondent was denied judgment against Sidmon McHie as guarantor.

Respondent collected part of its judgment against the Hammond Realty Company. It appealed from the other portions of the District Court's decree which, in substance, held that Sidmon McHie was the owner of the entire estate left by his former wife. The Circuit Court of Appeals correctly concluded that respondent, by collecting part of its judgment against Hammond Realty Company, did not waive its right to appeal from the remaining portions of the decree. The Circuit Court of Appeals pointed out that the Hammond Realty Company never denied its obligation and did not appeal from the judgment against it, so that said judgment against the Hammond Realty Company became final and conclusive (R. 172). In its opinion (R. 171), the Circuit Court of Appeals relied on the following Indiana cases which hold

that an appellant by accepting that to which he is entitled in any event does not thereby waive his right to appeal from other distinct and unrelated portions of a decree:

State ex rel. Jackson v. *Middleton,* 215 Ind. 219, 224, 19 N. E. (2d) 470, 472.

City of Indianapolis v. *Stutz Motor Car Co.,* 94 Ind. App. 211, 180 N. E. 497.

This Court has on frequent occasions affirmed the same rule:

Gilfillan v. *McKee,* 159 U. S. 303, 311, 312.

Embry v. *Palmer,* 107 U. S. 3, 8.

Reynes v. *Dumont,* 130 U. S. 354, 394.

United States v. *Dashiel,* 3 Wall. 688, 702.

It is apparent, therefore, that both on the basis of established Indiana authority, as well as on the established authority of this Court, that the Circuit Court of Appeals was correct when it overruled the motion to dismiss respondent's appeal.

IV.

The Circuit Court of Appeals could also have reached the same result by holding that the divorce decree was res adjudicata in that it permanently and finally settled and adjudicated the property rights of the McHies.

The Findings of Fact (No. 6) (R. 87), Conclusions of Law (R. 88-89) and Final Judgment and Decree (R. 89-90) in the McHie divorce proceeding, demonstrate conclusively that the separation agreement of 1926 was considered and approved by the Indiana divorce court, and that said court definitely and conclusively adjudicated the respective property rights of the McHies. In its Conclusion No. 3 (R. 88), the Indiana divorce court determined:

> "The decree should confirm to each party the absolute ownership of the property, real and personal, now held by him or her, whether acquired by virtue of

said separation agreement of March 22nd, 1926, or otherwise. Transfers of property made pursuant to said agreement should be confirmed on the ground that they are executed transfers, regardless of whether said agreement was originally enforcible or not."

In its Final Judgment and Decree (R. 89) the Indiana divorce court decreed:

"(2) That there is hereby confirmed to each party the absolute ownership of all the property, real and personal, now held by him or her, free from any right, title, interest or claim, legal or equitable, present or future, by the other thereto."

And the Indiana divorce court concluded its Final Judgment and Decree (R. 90) as follows:

"* * * and that any other financial obligations, rights or claims of any kind which might be asserted by either party against the other arising from anything occurring prior to this time are hereby terminated absolutely, except only said guarantee on said Hieland Golf Course, Inc., bonds."

It is uncontroverted that in a divorce proceeding in Indiana the court has complete jurisdiction to determine property and separation agreements entered into between husband and wife prior to divorce, and the court having done so, the adjudication and construction is *res adjudicata* for all future purposes between the divorced parties and their privies.

Walker v. *Walker,* 150 Ind. 317, 324, 325, 327, 328.
McHie v. *McHie,* 106 Ind. App. 152, 177.
Wise v. *Wise,* 67 Ind. App. 647, 653, 654.
Blagetz v. *Blagetz,* 37 N. E. (2d) 318, 320.

Clearly, therefore, on the basis of the authorities cited above, the Circuit Court of Appeals could have reached the same result by holding that the divorce decree was *res adjudicata* in that it permanently and finally settled

and adjudicated the property rights of the McHies. The court concluded, however, that the independent covenant theory was ample for reversal.

CONCLUSION.

The decision of the Circuit Court of Appeals is clearly correct. Its decision is in accord with all of the decided cases which construe covenants not to "annoy or molest" contained in separation agreements similar to the 1926 separation agreement in this case. Petitioners have not cited a single case, Indiana, federal or otherwise, to the contrary. The decision of the Circuit Court of Appeals in overruling petitioners' motion to dismiss the appeal is also in accord with Indiana law, as well as with the decisions of this Court and intermediate federal courts. Petitioners have not cited a case to the contrary. The Circuit Court of Appeals, in its decision in this case, did not depart from the accepted and usual course of judicial proceedings. Thus, no question is presented to this Court which justifies the issuance of a writ of certiorari under Rule 38(5), or any of the other rules governing the granting of such writs. The petition therefore should be denied.

Respectfully submitted,

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February 2, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 654

SIDMON McHIE and HAMMOND REALTY COMPANY, a corporation,

Petitioners,

vs.

THE FIFTH AVENUE BANK OF NEW YORK, Executor of the Last Will and Testament of Isabel D. McHie,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONERS' REPLY BRIEF SUPPORTING PETITION FOR CERTIORARI.

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TABLE OF CONTENTS.

Cases Cited.

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I.

Elementary Indiana Decisions on Contract Law Violated.

Respondent emphasizes the controlling importance of Indiana decisions. It quotes the following recent decision of this Court holding that Circuit Courts of Appeals are *bound to follow state decisions* on questions of non-federal law, and that conflict between a Circuit Court of Appeals'

decision and the state decisions *assumes a new importance* as reason for granting certiorari, since the decision in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64:

> "The Rules indicate that the Court *will be persuaded* to grant certiorari where a circuit court of appeals has decided an important question of *local law* in a way *probably in conflict with applicable local decisions.*"
>
> *Ruhlin* v. *New York Life Ins. Co.* (1938), 304 U. S. 202, 206; 58 S. Ct. 860, 861.
>
> Respondent's Brief, 9.

But respondent argues against itself when it takes refuge in the Indiana law. *The petition for certiorari is grounded primarily on Indiana decisions* on every point. The Circuit Court of Appeals' violation of Indiana law is very serious on (1) law of contracts, and (2) law forbidding an appellant trustee to serve two masters during the appeal.

The Indiana contract decisions violated are set forth in the petition, page 13, as follows:

> "An accord cannot constitute a bar * * * unless shown to have been *fully* executed * * * Upon the failure (to fully perform) * * * they were *remitted* to their *original rights* * * * as if the accord had never been agreed upon."
>
> *Jackson* v. *Olmstead* (1882), 87 Ind. 92, 94.
>
> *Kingan* v. *Gibson* (1870), 33 Ind. 53, 54, top.
>
> *Demeese* v. *Check* (1871), 35 Ind. 514.
>
> *Woodruff* v. *Dobbins* (1845), 7 Blackford (Ind.) 582.

The *principle* announced in the above Indiana cases is *elementary* and is also announced by decisions of this Court, the federal courts, and such recognized texts as *Williston on Contracts* and *Restatement of the Law of Contracts.* (Petition 14, 15.)

There can be no doubt that the 1926 agreement was an "accord" contract within the above quoted Indiana rule. Accord is synonymous with "settlement." (1 C. J. S. page 464, par. 4.) The 1926 agreement calls itself a "settlement." (R. 27, top.) The opinion calls it a "settlement." (R. 174, top.) And the agreement purports on its face to be a settlement of all property and personal rights between the parties. Nor is it any less an accord because it covers *personal* rights, such as the right not to be molested or annoyed:

> "All claims *relating to the person* or personal property may be the subject of an *accord* and satisfaction * * *."
>
> 1 Am. Jur. page 217, sec. 5.

Respondent's brief admits that the right to be let alone was *one of the material considerations* of the 1926 agreement. The brief says:

> "The *true considerations* for the 1926 separation agreement were as follows: * * * (d) their mutual desire to live apart and separate."
>
> Respondent's Brief, page 11, bottom.

The above admission brings respondent squarely in conflict with the above quoted Indiana decisions which hold that any material breach of the accord "remits" the parties to their "original rights."

Also, the above admission of respondent is squarely in line with the District Court's finding that:

> "Paragraph 6 of said Separation Agreement, which reads as follows: 'It is agreed that the parties shall live apart and separate and shall not annoy and molest each other,' *constituted one of the true considerations* for said Agreement.
>
> "One of the several considerations *for which counterclaimant in fact executed the contract* of March

> 22nd, 1926, which is one of the above-mentioned exhibits, was a covenant by said decedent that she 'shall not annoy or molest' him. Said decedent continuously, completely and flagrantly breached said covenant from the time it was made down to the time of her death, by continuously and *maliciously* annoying and molesting him during that entire period. *Said consideration had completely failed* at the time of decedent's death."
>
> R. 120, bottom.

Moreover, the Circuit Court of Appeals admitted the correctness of the above finding of fact but concluded in law that Mrs. McHie's breach did not operate to remit McHie to his original rights.

R. 173, bottom.

A mere comparison of the rule above quoted from the Indiana decisions, with respondent's admission, suffices to show that the Circuit Court of Appeals' decision is "probably in conflict with applicable local decisions." (Rule 38.)

This Is Primarily a Contract Case,—Not a Domestic Relations Case, as The Opinion and Respondent's Brief Erroneously Imply. The Opinion Cites Only Domestic Relations Cases.

Both the opinion and respondent's brief commit the fundamental error of seizing on a non-controlling *circumstance* in this case while ignoring the controlling *principles* of contract law. They search around in the obscure corners of the law until they find two cases containing a covenant "not to molest" and then they rest the decision on those cases,—oblivious to the fact that the *questions* involved were entirely different. The only re-

semblance of those cases to the one at bar is that they contain the word "molest." For instance:

> *Hughes* v. *Burke* (1934), 167 Ind. 472; 175 Atl. 335, 337, was where a wrongdoing husband abandoned his wife and children, after which he contracted to support them. Held, that the wife's alleged molestation of him was "independent" of his duty to support.
>
> *Sabbarese* v. *Sabbarese* (1929), 104 N. J. Eq. 600; 146 Atl. 592, is primarily an *adultery* case. It contains a *dictum* to the effect that the wife's molestation of the husband would not be a defense to an action on contract for support money.

The Circuit Court of Appeals' opinion decides the contract phase of this case *entirely* on the above two *domestic relations* cases from *Maryland* and *New Jersey.* Nor is the opinion aided by respondent's additional citations of an old English *adultery* case (*Fearan* v. *Earl of Aylesford,* 14 Q. B. Div. 792), and two other New Jersey cases involving support money payments for wife and children. (*Stern* v. *Stern,* 112 N. J. Eq. 8; *Moller* v. *Moller,* 188 Atl. 505.) Even on domestic relations law, the opinion has somehow chosen the minority rule, the majority being contra. (Petition, 20, top.)

The controlling question in our case is not in the field of domestic relations but contract. This is illustrated by the fact that this same question could arise between parties not married and it could grow out of some other kind of accord than a separation agreement. For instance:

Suppose a contract for mutual wills had been made in 1919 between brother and sister, between parent and child, or between business associates. Suppose in 1926 they made an accord (settlement) contract giving up their original contract rights, after which one of them maliciously and continually breached one of the accord cove-

nants so as to produce a failure of one of the "true considerations" of the accord. Then the wrongdoer dies. Is the survivor entitled to be "remitted" to his "original rights" under the Indiana cases above cited?

Accordingly, the opinion and respondent's brief let the tail wag the dog, and they arrive at the highly unsound result of deciding McHie's rights to a $250,000.00 estate under the 1919 will contract on the sole authority of two *adultery* and *support money* cases from other states, oblivious to the contract questions involved and the Indiana contract decisions governing. This is apparent from respondent's argument at page 12, where, after citing these domestic relations cases, respondent criticizes us for failing to cite a case "on similar facts." Then respondent dismisses our Indiana decisions on accord contracts with a wave of the hand saying merely: "Those cases have no bearing on the instant case and are of no assistance to them (petitioners) in this Court." (Brief, 12.)

Actually, it appears that the "independent covenant" doctrine has no place in the law of accord, under the above cited Indiana cases holding that all material covenants of an accord must be fully performed and none can be breached with impunity. (Petition, 13-15.) But anyhow, the covenant against molestation certainly was not "independent," so that it could be breached without affecting the accord, in view of respondent's above quoted *admission* that this covenant was one of the "true considerations" of the accord, and in view of the District Court's finding to the same effect (R. 121, top), which fact was not challenged in the opinion.

While it is sufficient for us to show that the decision violates the Indiana law on accords, it also violates the

broader contract principle that one party (McHie) should not be held to his promise to give up her estate when she breached one of her material promises—particularly when her breach was *malicious*. This broader principle is summarized in the following text and confirmed by the following Indiana decisions:

> "* * * one party should not be required to perform if the other does not. The latter principle, like the excuses based on fraud, duress or mistake, is founded on concepts of justice, and is imposed by law although there may be no reason to suppose that the question that has arisen was within the contemplation of the parties."
>
> Restatement of Law of Contracts (1932 Perm. Ed.), Sec. 274, at page 400. Also Secs. 270, 275, 314, 318.

To like effect, see:

Board of Commissioners v. *South Bend Ry. Co.* (1888), 118 Ind. 68, 79; 20 N. E. 499.

Jeffries v. *Lamb* (1880), 73 Ind. 202.

Coe v. *Smith* (1848), 1 Ind. 267.

Respondent's brief is significantly silent on the following important contract points made in the petition:

(1) Respondent *cites no Indiana contract case* to show what it contends the applicable law *is*, though it asserts that Indiana law controls. In a state as old as Indiana, this Court might expect respondent to find a decision to support its contention on an elementary contract principle. Instead, respondent cites more adultery and support money cases from England and New Jersey.

(2) Respondent does not answer the important point that the opening part of the 1926 agreement *recites the moving cause* of the agreement to be the

personal consideration of not being molested or annoyed,—to avoid previous "friction" and to promote their "comfort, health and happiness." (R. 27, top. Petition, 15, bottom.)

(3) Respondent does not deny the obvious point that *the opinion is self-contradictory.* The opinion holds the Sixth Covenant against molestation to be *dependent* for the purpose of condoning Mrs. McHie's breach of it (saying her breach was "caused" by McHie's failure to pay money under other covenants), after which the opinion turns around in the next sentence and holds the Sixth Covenant to be "independent" for the purpose of depriving McHie of the relief which the District Court granted him. (R. 174, top.) The only answer made by respondent is to say that the language in question "was simply an *observation* made by the court and did not constitute the reason for the decision," but respondent does not deny its conflicting character. It is impossible to segregate *two adjoining sentences* in an opinion and to say that one is "observation" and the other is "reason." Actually the two conflicting statements are part and parcel of the opinion and they confuse the contract law of Indiana, besides violating it.

It is important to observe that the District Court, which presumably is most familiar with the local law of its own state, stated its conclusions of law and decree in favor of McHie (R. 121, 122).

Strong reason exists for believing that McHie has been deprived of the contract law of Indiana as granted him by the District Court in Indiana, because of a decision of the learned Circuit Court of Appeals which

ignores the contract law of his state and goes off on a tangent in the domestic relations law of New Jersey and Maryland. Petitioners respectfully submit that this merits investigation by this Court,—particularly in view of this Court's recent decisions confining the Circuit Court of Appeals to Indiana law.

II.

Decisions of Indiana and of This Court Which Forbid Enforcement of Judgment During Appeal, Violated.

Respondent is significantly silent on the following crucial points in section II, pages 20-23 of the petition:

(1) Respondent does not deny our charge that it pretended to serve two masters during appeal—pretended to collect a trust asset *for McHie's benefit* in the District Court while seeking to take the ownership of this asset away from him on appeal. Nor does respondent deny our quotation of its *admission* in the Circuit Court of Appeals that it was so doing. (Petition, 20, bottom.)

Instead, respondent's brief (13, bottom), like the opinion (R. 170, bottom), seeks to excuse this enforcement by stating that the judgment had become final as against the judgment debtor, Hammond Realty Company. But that misses the point. Whether this trust asset took the *form* of a final judgment or some other form, respondent had no business collecting it for *McHie's benefit* under the District Court's decree, while appealing against McHie and seeking to *change the ownership* of the asset which was part of the *subject matter of the appeal.*

(2) This last mentioned conduct of respondent violates the very decisions of this Court which are cited in respondent's brief, page 14. Those cases hold that waiver of appeal will result "from conduct which is *inconsistent* with the claim of a right to reverse the judgment or decree." (Citation, *infra.*) Here, the District Court's decree, binding until reversed, made respondent a *trustee* for McHie of this entire estate, *including* this $10,000.00 money judgment against Hammond Realty Company. While *choosing* (it was not compulsory during appeal) to *collect* this trust asset for McHie's benefit in the District Court, respondent sought on appeal to take the asset away from McHie—dealing with the *subject matter of the appeal* for two conflicting masters—McHie below and Mrs. McHie's legatees above. Respondent's own cases say that the only time an appellant can collect part of the judgment below without waiving the appeal is when:

> "The amount awarded, paid, and accepted (below) *constitutes no part* of *what* is in controversy" (above).
>
> *Gilfillan* v. *McKee* (1895), 159 U. S. 303; 16 S. Ct. 6, 9, 2nd column.
>
> *Embry* v. *Palmer* (1883), 107 U. S. 3; 2 S. Ct. 25, 29, bottom.

(3) Respondent's brief is silent on our charge that its conduct of collecting this trust asset for the *benefit* of the *decreed* beneficiary, McHie, falls within the condemnation of the very Indiana decision cited in the opinion, and in respondent's brief, to justify the conduct. That decision says that Indiana law is:

> "declaratory of the common law rule that *a party cannot accept the benefit* of an adjudication and yet allege it to be erroneous." (R. 171.)
>
> *State ex rel. Jackson* v. *Middleton* (1938), 215 Ind. 219, 224; 19 N. E. (2d) 470, 472.

(4) Respondent's brief is likewise silent on the other highly pertinent Indiana decisions cited in the petition, holding that waiver of appeal results from enforcement below, even though the enforced part of the decree is *not controverted.* (Petition, 21.) Nor does the brief deny our point that this rule is applicable to trustee appellants, both under Indiana and federal decisions. (Petition, 22.)

So, whether waiver of appeal be considered a question of Indiana or federal law, the opinion violates both by permitting respondent's anomalous conduct, so plainly admitted by its pleading in the Circuit Court of Appeals. (Petition, 20, bottom; R. 164, par. 4.)

III.

This Court Is Not Required To Review The Indiana Divorce Law, Because That Question Is Expressly Excluded From The Circuit Court Of Appeals' Decision.

The District Court in Indiana, which presumably is most familiar with the strictly local divorce laws of its own state, ruled against respondent's contention regarding the effect of the Indiana divorce decree of the McHies, by stating general conclusions of law and decree against respondent. (R. 121, 122.)

The Circuit Court of Appeals did not disturb the District Court's ruling on divorce but expressly *excluded* the divorce question from its decision, saying:

> "*We put to one side* the effect the *divorce decree* had upon the property rights of the McHies, and we shall examine the *covenants* of the contract of March 22nd, 1926, * * *."
>
> Opinion: R. 173, bottom.

This Court will not review questions not considered by the Circuit Court of Appeals—particularly not local questions such as divorce. The only excuse for asking this Court to review an Indiana divorce question would be if the Circuit Court of Appeals had *decided* the divorce question contrary to Indiana decisions. Respondent invites this Court voluntarily to invade the Indiana divorce field by speculating that the Circuit Court of Appeals "could also have reached the same result" if it had gone into the divorce question. This Court will not do so:

Montana Ry. Co. v. *Warren* (1890), 137 U. S. 348, 34 L. Ed. 681, 11 S. Ct. 96, 2nd column;

Charles Warner Co. v. *Independent Pier Co.* (1928), 278 U. S. 85, 91, 49 S. Ct. 45, 46.

But if the divorce case be reviewed it will be found that the divorce decree does not aid respondent because:

(1) The present record shows that in the District Court respondent *waived* any right to set up the 1936 divorce decree as adjudicating all prior contract rights of the parties, because respondent's complaint in the District Court sued McHie upon a 1933 guaranty contract which he gave to Mrs. McHie. In other words, *respondent itself went behind the divorce decree by suing on a contract predating the divorce.*

R. 2, bottom.

R. 7, bottom.

Besides suing on the 1933 guaranty in its complaint, respondent's motion for summary judgment further sets up a whole series of transactions between Mr. and Mrs. McHie from 1928 to 1933, all of which preceded the 1936 divorce decree.

R. 34, 35.

R. 48-57.

Such voluntary pleading in the District Court *waives* respondent's present contention about the 1936 divorce decree being *res adjudicata* of prior contract rights of the parties.

> "It is nevertheless a general rule that a party entitled to claim the benefit of a *former judgment* may waive or estop himself from asserting such right. So where a party * * * *voluntarily opens an investigation* of the matters which he might claim to be concluded by it, or makes an admission of record inconsistent with the former judgment, he will be held to have waived the benefit of the estoppel (of the former judgment), and the *case may be determined as if no such former judgment had been rendered.*"
>
> 34 C. J. 749, Sec. 1161.

> "Proceedings taken which are *inconsistent* with the error alleged will be considered as *waiving* such error."
>
> 5 C. J. S., page 1234, Sec. 1804.
>
> *Mack* v. *Levy,* 60 Fed. 751, appeal dismissed, 154 U. S. 508.

(2) The general language which respondent quotes from the divorce decree has no bearing on the present case because *the 1919 will contract was not placed in issue* or even mentioned in the divorce complaint (R. 64), nor in the divorce answer (R. 71). The Indiana law is very clear that a decree must be read in the light of the issues and *a matter not pleaded is not adjudged* in Indiana, no matter how broad the language of the decree. This rule has been specifically applied to divorce cases:

> "No question of law is better settled than that a judgment which a court attempts to render *upon an issue which is not presented* is a *nullity.*"
>
> *Moore* v. *Moore* (1922), 81 Ind. App. 169, 173 (bottom). Divorce case. Transfer denied by Indiana Supreme Court (see heading), 81 Ind. App. 169.
>
> *Boardman* v. *Griffin,* 52 Ind. 101, 106 (middle).

This Court will not decline to review a decision which conflicts with Indiana contract decisions, and which conflicts with both Indiana's and this Court's decisions on waiver of appeal, and which even conflicts with *itself* on the independent covenant doctrine,—simply because respondent argues (erroneously) that the court "could have reached the same result" by going into Indiana divorce laws.

CONCLUSION.

Respondent's silence on crucial charges in the petition, and its failure to cite any Indiana contract cases, supports our contention that the District Court correctly applied the law of its own state when it decided for McHie, and that:

(1) The Circuit Court of Appeals' decision conflicts with Indiana decisions since 1845 on contract law;

(2) The decision conflicts with both Indiana's and this Court's decisions on waiver of appeal, and establishes the novel and dangerous doctrine that a trustee appellant can serve two conflicting masters during the appeal.

(3) The opinion conflicts with itself on the independent covenant doctrine, by making the same covenant dependent for one party and independent for the other.

Therefore, each petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

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